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SHOULD “SUBSTITUTE” PRIVATE ATTORNEYS GENERAL ENFORCE PUBLIC ENVIRONMENTAL ACTIONS? BALANCING THE COSTS AND BENEFITS OF THE CONTINGENCY FEE ENVIRONMENTAL SPECIAL COUNSEL ARRANGEMENT

Julie E. Steiner*

INTRODUCTION

There is a developing phenomenon of quasi-privatized environmental enforcement occurring directly on behalf and in the name of governments by entrepreneurial attorneys.¹ These counselors contract with and substitute² for the public enforcement agency (typically the State Attorney Generals),

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1. States, territories and Native American tribes (collectively, “States”) utilize environmental special counsel arrangements. These arrangements, however, are presently limited to the State level because the United States Government bans such arrangements at the federal level under Executive Order No. 13,433. See Exec. Order No. 13,433, Protecting American Taxpayers From Payment of Contingency Fees, 72 Fed. Reg. 28,441 (May 16, 2007). State appetite for the arrangement varies, reflecting different political receptivity and policy enforcement tolerance particular to the sovereign. . See generally Manhattan Inst., Ctr. for Legal Policy, *Regulation Through Litigation: The New Wave of Government-Sponsored Litigation*, Conference Proceedings, 1 MANHATTAN INST. CONF. SERIES 7 (1999), available at <http://www.manhattan-institute.org/pdf/mics1.pdf> (noting that there are Attorneys General who do not enter into such agreements).

2. Drawing from the private attorneys general organizational typology articulated by Professor William Rubenstein, in Part I this Article categorizes these types of enforcers as a variety of “substitute” private attorneys general. See William B. Rubenstein, *On What a “Private Attorney General” Is—And Why It Matters*, 57 VAND. L. REV. 2129 (2004).

deriving professional payment by drawing a contingent fee out of the public's environmental damage award.

To the extent that commentators have focused on this enforcement phenomenon, they have never recognized the trend as part of a broader movement toward environmental enforcement outsourcing. The attention, moreover, has largely centered on whether the arrangement violates the standard of neutrality,³ whether it improperly regulates through litigation rather than legislation,⁴ whether it circumvents the proper appropriations system,⁵ or whether it is ethically appropriate.⁶ Because such critiques have not viewed this development as part of a larger environmental enforcement trend, they have never addressed whether this professional compact optimally facilitates the goals of environmental enforcement.⁷

3. Martin H. Redish, *Private Contingent Fee Lawyers and Public Power: Constitutional and Political Implications*, SEARLE CTR. RESEARCH ROUNDTABLE ON EXPANSION OF LIABILITY UNDER PUB. NUISANCE 6 (2008), available at http://www.law.northwestern.edu/academics/searle/papers/Redish_revised.pdf (concluding the "government's use of private contingent fee attorneys in civil litigation is (1) inconsistent with the nation's democratic tradition, (2) unethical, and (3) a violation of the Due Process Clause"); Application for Leave to File Amici Curiae Brief and Proposed Amici Curiae Brief of Legal Ethics Professor Erwin Chemerinsky et al. in Support of Petitioners, Cnty. of Santa Clara v. Superior Court, No. S163681 (Cal. Apr. 27, 2009), 2009 WL 1541977 [hereinafter Law Professors Amici Brief] (evaluating whether there should be a blanket prohibition against local government entities' ability to retain private counsel on a contingency fee basis to assist in the pursuit of a lead paint abatement public nuisance action from the standpoint of government neutrality and legal ethics).

4. Redish, *supra* note 3; Victor E. Schwartz et al., *Tort Reform Past, Present and Future: Solving Old Problems and Dealing With "New Style" Litigation*, 27 WM. MITCHELL L. REV. 237, 258–59 (2000); John J. Zefutie, Jr., Comment, *From Butts to Big Macs—Can the Big Tobacco Litigation and Nation-Wide Settlement with States' Attorneys General Serve as a Model for Attacking the Fast Food Industry?*, 34 SETON HALL L. REV. 1383, 1411–13 (2004); Robert B. Reich, *Regulation Is Out, Litigation Is In*, USA TODAY, Feb. 11, 1999, at A15.

5. Victor E. Schwartz et al., *Governments' Hiring of Contingent Fee Attorneys Contrary to Public Interest*, LEGAL BACKGROUNDER, Aug. 8, 2008, at 4, available at <http://www.wlf.org/upload/08-08-08schwartz.pdf> ("[T]hese 'new style' cases give the state executive branch and local governments a new revenue source without having to raise taxes.").

6. Redish, *supra* note 3, at 6.

7. While Professor David A. Dana did not focus on environmental enforcement, in *Public Interest and Private Lawyers: Toward a Normative Evaluation of Parens Patriae Litigation by Contingency Fee*, 51 DEPAUL L. REV. 315 (2001), he recognized that the tobacco litigation alliance between the plaintiffs' bar and States would likely reappear in other contexts. See *id.* His

This Article suggests that the development of the environmental special counsel arrangement should be recognized as part of a broader trend of substitute private attorney general enforcement, covering remediation, cost recovery, natural resource damage, climate change, and public nuisance actions. The Article further addresses an underappreciated inquiry about whether the arrangement furthers the deterrence and restorative compensation goals of environmental enforcement. To address the latter question, the Article identifies and weighs the costs and benefits of the environmental special counsel arrangement. The Article posits that the restorative compensation goal is inherently equitable in nature, which conflicts with the entrepreneurial attorney's incentive to shape the character of the damage award toward monetized recovery rather than restorative relief.

Part I establishes the necessary background context for an informed dialogue by delineating the contours of the "substitute environmental special counsel" arrangement.⁸ In so doing, the Article describes the contexts in which governments utilize the environmental special counsel arrangement and identifies the unique characteristics of the arrangement to distinguish it from other privatized environmental enforcement structures such as citizen suits.⁹ Such environmental special counsel arrangements are brought by private attorney generals: (i) whose standing to sue is derivative of the government's *parens patriae* or public trust standing,¹⁰ and (ii) who fund public litigation in return for a contingency fee drawn from the damage award.

piece sought to frame important issues, identify weaknesses in the "democracy" critique, and direct attention to the conflict of interest and agency cost issues. *See id.*

8. These arrangements are referenced in pleadings and literature by a variety of terms, typically as "special Attorney General," "outside counsel" and "special counsel" agreements. This Article adopts the uniform term "environmental special counsel" and defines their common attributes.

9. Under the typical citizen suit provisions, any individual or organization that can demonstrate constitutional standing can initiate a federal lawsuit in the district court for injunctive relief. *See, e.g.,* Clean Water Act, § 505, 33 U.S.C. § 1365 (2010); Resource Conservation and Recovery Act, § 7002, 42 U.S.C. § 6972 (2010); Clean Air Act § 304, 42 U.S.C. § 7604 (2010); *see also* JEFFREY G. MILLER & ENVTL. LAW INST., CITIZEN SUITS: PRIVATE ENFORCEMENT OF FEDERAL POLLUTION CONTROL LAWS 3-5 (1987).

10. Contrast the environmental special counselor's derivative standing from

Part II identifies the costs and benefits from the standpoint of whether the arrangement maximizes the government's ability to achieve the environmental enforcement goals of deterrence and restorative compensation. In this Part, "costs" represent negative impacts on enforcement goals, and practices that facilitate these goals are considered "benefits."

Part III balances the costs and benefits and proposes that certain factors deserve more weight than others as a matter of environmental enforcement policy. As such, the Article suggests that the benefits of privatized enforcement are of sufficient magnitude to justify and encourage the arrangement because the arrangement fills an undesirable enforcement gap where environmental violations go undetected or under-enforced.¹¹ The Article posits that private citizen suit enforcement is a useful (but incomplete) augmentation scheme, and argues that substitute environmental special counsel enforcement should exist to help fill the current structural gaps in the enforcement scheme.

Part IV suggests a reformative approach. Specifically, the Article suggests a fee-shifting approach on top of the damage award in place of a contingency fee drawn from the damage award compensation structure, an open and competitive bidding requirement, a preference for government-led enforcement where feasible, and adequate controls on the monitoring process. From an environmental enforcement perspective, such reforms temper the worst costs of the contingency fee arrangement while still sufficiently incentivizing privatized enforcement.¹²

a citizen suit enforcer's need to demonstrate independent Article III standing.

11. See Barton H. Thompson, Jr., *The Continuing Innovation of Citizen Enforcement*, 2000 U. ILL. L. REV. 185, 189 (2000).

12. The Author recognizes that when structural curbs are placed on the arrangement, there may be a consequential dampening of entrepreneurial behavior. In Part IV, this Article makes the case that these structural reforms are worth the potential consequences, theorizing that such curbs will still provide sufficient incentive for entrepreneurialism—as seen in such other contexts as securities and class actions—while still guarding against some of the more dramatic costs that are particularly acute in entrepreneurial environmental enforcement.

I. THE ENVIRONMENTAL SPECIAL COUNSEL ARRANGEMENT

Environmental special counselors are a curious enforcement breed. To the outside observer, they are government attorneys—environmental special counselors bring suit in the name of the government, have authority to negotiate on behalf of the sovereign to redress public injury, and sign pleadings alongside or in place of the government. And yet, they are different from their government counterparts in several crucial respects. They fund the litigation costs of the action and, in exchange, have an entrepreneurial investment in the outcome of the litigation by virtue of their contingency fee arrangement. Since their public charge and their private economic interests intersect, environmental special counselors exhibit a mixture of public and private attributes—a cross between civil claim prosecutors and private entrepreneurs. They find close analogy with private entrepreneurial attorney representation of states in claims against “Big Tobacco.”¹³

What this Article refers to as “substitute environmental special counsel arrangements” began in the 1980s in the context of state litigation for asbestos removal.¹⁴ The asbestos public nuisance abatement action served as the prototype for the wave of public nuisance tort claims that later surfaced in a number of states in the form of lead paint nuisance abatement actions. These lead paint lawsuits have been brought by environmental special counsel against numerous industrial manufacturers alleging that the sale of lead-based paint products, which ultimately found their way into the public environment, constituted a public nuisance.¹⁵

13. Julie E. Steiner, *Private Enforcement of Contamination and Climate Change Liability Litigation*, 9 A.B.A. ENERGY LITIG. J. 4 (Winter 2010).

14. Walter Olson, *Tort Travesty*, WALL ST. J., May 18, 2007, available at http://www.manhattan-institute.org/html/_wsj-tort_travesty.htm.

15. Recently, many of these lead paint lawsuits have been rejected on their merits in the courts. See *City of Chicago v. Am. Cyanamid Co.*, 823 N.E.2d 126 (Ill. App. Ct. 2005); *City of St. Louis v. Benjamin Moore & Co.*, 226 S.W.3d 110 (Mo. 2007) (en banc); *In re Lead Paint Litig.*, 924 A.2d 484 (N.J. 2007); *State v. Lead Indus. Ass'n*, 951 A.2d 428 (R.I. 2008). In July 2008, the Rhode Island Supreme Court overturned a verdict against three lead paint companies, concluding that the trial judge erred in failing to grant defendants' motion to dismiss because “the state has not and cannot allege any set of facts to support its public nuisance claim.” *Lead Indus. Ass'n*, 951 A.2d at 435–36.

On a track somewhat distinct from the public nuisance abatement action context, environmental special counselors spearhead remedial lawsuits, bringing claims for environmental cleanup, cost recovery and natural resource damages.¹⁶ These actions are typically brought under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"),¹⁷ state statutes, and common law theories.¹⁸

For example, in the Northern District of Oklahoma, Attorney General Drew Edmonson contracted with substitute environmental special counselors to sue major poultry processing manufacturers—including Tyson Foods—in what are termed the "Big Chicken" lawsuits.¹⁹ The suits seek equitable and monetary damages for contamination of the Illinois River watershed resulting from poultry litter run from processing operations, which caused damage downstream in Oklahoma.²⁰ Similarly, in litigation inspiring the name "Big Climate," the Native Village of Kivalina sued ExxonMobil and a bevy of other defendants in the energy supply and distribution chain ("*Kivalina*").²¹ Raising allegations

16. See, e.g., *New Mexico v. Gen. Elec. Co.*, 467 F.3d 1223 (10th Cir. 2006); *Louisiana v. Rowan Co.*, Civ. No. H-08-1682, 2010 WL 2991089, at *1 (S.D. Tex., July 28, 2010) (natural resources damages and remediation from pollutants discharged from the Rowan-Midland offshore drilling rig); Mem. Op., Comm'r of Dep't of Planning and Nat. Res., *Dean C. Plaskett v. Esso Standard Oil, S.A.*, No. 1:98-cv-00206-RLF (D.V.I. Oct. 28, 2002).

17. Comprehensive Environmental Response, Compensation and Liability Act, §§ 101 et seq., 42 U.S.C. §§ 9601 et seq. (2010).

18. The Author has previously argued that environmental special counsel arrangements are improper under CERCLA as the statute is currently structured, and proposed legislative reform that will permit the government reasonable enforcement fees when recovering natural resource damages to facilitate enforcement of natural resource damage claims. See Julie E. Steiner, *The Illegality Of Contingency-Fee Arrangements when Prosecuting Public Natural Resource Damage Claims and the Need for Legislative Reform*, 32 WM & MARY ENVTL. L. & POL'Y REV. 169 (2007).

19. *Oklahoma v. Tyson Foods*, Civ. No. 05-329-GKF-SAJ, 2008 WL 4832658, at *1 (N.D. Okla. Oct. 28, 2008). For a discussion of the private attorneys involved on the enforcement side, see *Edmondson's Lawyers Face Big Payout in Big Chicken Suit*, LEGAL NEWSLINE, Feb. 6, 2008, <http://legalnewsline.com/news/207579-edmondsons-lawyers-face-big-payout-in-big-chicken-suit> [hereinafter *Chicken Suit*].

20. *Chicken Suit*, *supra* note 19.

21. *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863 (N.D. Cal. 2009). On October 16, 2009, the trial court dismissed the Kivalina lawsuit on grounds that (1) it raises a non-justiciable political question, and (2) plaintiffs lack Article III standing. *Id.* at 883. The Village and City of Kivalina

reminiscent of the successful core conspiracy claims in the “Big Tobacco” lawsuits, the *Kivalina* plaintiffs alleged that members of the energy industry knew about the environmental effects of greenhouse gases, yet conspired to create false scientific debate regarding global warming to deceive the public.²²

Environmental special counselors are a type of “substitute” private attorney generals who have certain common characteristics relating to standing, fee structure, government oversight and litigation goals.²³ First, such

have retained the services of attorneys from two prominent public interest organizations along with a suite of private law firms as “other counsel,” including two attorneys who formerly represented major players in the tobacco litigation context: Stephen Susman of Susman Godfrey LLP and Steve Berman of Hagens Berman Sobol Shapiro LLP. *Id.* at 867. The tobacco litigation that Susman and Berman were involved with ultimately led to the four primary tobacco companies settling conspiracy charges for over \$200 billion. See Tobacco Master Settlement Agreement, available at <http://ag.ca.gov/tobacco/msa.php> (last visited Jan. 24, 2011).

22. Complaint at 5, *Native Vill. of Kivalina*, 663 F. Supp. 2d 863 (No. C 08-1138 SBA) (averring the defendants knew or should have known their emissions would impact global warming trends and that they conspired to create a false scientific debate to deceive the public).

23. To robustly evaluate the desirability of the environmental special counsel arrangement, this Article identifies certain qualities that characterize this particular type of enforcement arrangement and places them within a heuristic framework that helps identify its structural advantages and disadvantages. In so doing, this Article draws from Professor William Rubenstein’s organizational typology in which he maps various categories of private attorneys general along a continuum that appreciates their public/private lawyering attributes. Rubenstein, *supra* note 2. Rubenstein divides private attorneys general into three types, two of which are important for purposes of this Article: “substitute” private attorneys general (which, as will become clear, typify environmental special counselors) and “supplemental” private attorneys general (which include citizen suit enforcers). Substitute private attorneys general perform the same function as the government attorney general—such attorneys are cloaked with the mantle, and stand in the shoes of, the attorney general. Rubenstein’s examples include the use of David Boies to try the Microsoft case and the hiring of plaintiffs’ contingency fee counsel to recoup state monetary loss attributable to smoking-related illness. *Id.* at 2143; see also Howard M. Erichson, *Coattail Class Actions: Reflections on Microsoft, Tobacco, and the Mixing of Public and Private Lawyering in Mass Litigation*, 34 U.C. DAVIS L. REV. 1 (2000). Substitute private attorneys general represent the public, are paid an hourly/lodestar or contingent fee and seek compensation and, secondarily, deterrence. “Supplemental” private attorneys general, according to Rubenstein, must demonstrate Article III standing as a jurisdictional prerequisite to bringing suit. Rubenstein, *supra* note 2, at 2147. The supplemental private attorney general, thus, maintains suit because she can prove *de facto* injury; it is understood—and transparent to the onlooker—that she pursues her own interests, even in situations where she is motivated

arrangements occur between governments, with standing to redress public environmental harm under statutory or common law public trust or *parens patriae* authority, and environmental special counsel who have been delegated limited power to handle the public action. The actions are thus prosecuted in the name of the government or governmental agency.²⁴ Second, environmental special counselors are paid with a contingency fee that is withdrawn from the public's environmental damage award.²⁵ Third, at least theoretically, the government continues to oversee its environmental special counsel proxy. Lastly, environmental special counselors are motivated by compensation and the actions implicate large monetary recoveries.

The arrangement is billed as so-called "no cost" litigation because environmental special counselors fund the costs of prosecution. Critics, however, suggest that the label "no cost" is a misnomer because such arrangements often give rise to costs, such as lost government resources and a diminished return in damages recovered in the suit.²⁶

Environmental special counsel arrangements are materially distinct from citizen suit enforcement. Environmental special counselors exhibit more public attributes than their citizen suit brethren. Citizen suit enforcers are a less public brand of private attorney general because they, by definition, represent private interests

by public goals. *Id.* Conversely, the substitute private attorney general does not need to clear this standing hurdle. Supplemental private attorneys general represent private clients, but their litigation contributes to the public interest by supplementing the government's enforcement of the law and policy. Supplemental private attorneys general are also paid an hourly/lodestar or contingent fee but as a result of a fee shift, and like substitute private attorneys general primarily seek compensation and, secondarily, deterrence.

24. Such actions are often styled with the government as a named plaintiff and the environmental special counselor as agent for the government. *See, e.g.,* *New Mexico v. Gen. Elec. Co.*, 467 F.3d 1223 (10th Cir. 2006); *Mem. Op., Comm'r of the Dep't of Planning and Nat. Res., Dean C. Plaskett v. Esso Standard Oil, S.A.*, No. 1:98-cv-00206-RLF (D.V.I. Oct. 28, 2002).

25. *Steiner, supra* note 18 at 170–71.

26. *See e.g.,* Adam Liptak, *A Deal For the Public: If You Win, You Lose*, N.Y. TIMES, July 9, 2007, at A10 ("The taxpayers may pay either way. Any recovery in the case belongs to the state's taxpayers, but Mr. Edmondson has signed a contract to give a big chunk of it away."); Schwartz et al., *supra* note 5, at 3 ("Contingency fee awards are often misrepresented as coming at no cost to the public, with no need for government resources. But these contracts are not free. A fee paid to private lawyers as a result of the litigation is money that would otherwise fund government services or offset the public's tax burden.").

sufficient to withstand Article III particularized standing. Citizen suit enforcers bring suit in the name of their private or organizational client, not in the name of the government as do substitute environmental special counsel enforcers. This raises an important transparency issue that exists for the environmental special counselor, but not for the citizen suit plaintiff. To the onlooker, by virtue of an action styled "citizen suit plaintiff vs. defendant," the citizen suit is understood to be spearheaded by a private enforcer. Environmental special counselors, however, appear like any other government attorney in actions styled "government vs. defendant," and thus their personal stake is obscured by a cloak of government-supplied legitimacy.²⁷ Moreover, supplemental citizen suit enforcers are paid by virtue of a fee shift or by their clients, not from a contingency fee award as are substitute enforcers. Both supplemental and substitute enforcers pursue compensation over deterrence. In this way, both are distinguished from purely public attorneys, who are salaried and pursue deterrence over compensation.

In a few instances, courts have addressed the legality of these arrangements. The current trend is to permit such agreements if adequate supervision by the government attorneys exists and is expressly provided for in the Professional Services Contract between the government and substitute enforcer.

The most thorough vetting of the issues occurred in the context of the California lead paint litigation.²⁸ In *County of Santa Clara v. Superior Court*, with abatement as the sole remedy, numerous public entities prosecuted public nuisance actions against businesses that manufactured lead paint.²⁹ The public entities were represented by their own government attorneys as well as by special environmental counsel on a contingency.³⁰

Initially, the trial court in the *Santa Clara* action invalidated the contingency fee agreement between the county and its substitute environmental special counselors

27. Because the environmental special counselor's standing is derivative of the government's standing, substitute enforcement overcomes a difficult hurdle that exists at the citizen suit enforcement level.

28. *Cnty. of Santa Clara v. Superior Court*, 235 P.3d 21 (Cal. 2010).

29. *See id.*

30. *Id.* at 25.

under what is now known as the “Clancy doctrine”; this doctrine posits that such agreements violate the standard of neutrality required to prosecute public nuisance actions.³¹ The trial court reasoned that environmental special counselors are not, as a practical matter, subject to effective monitoring.³²

The Sixth District Court of Appeal overturned the superior court.³³ The appellate court rationalized that ultimate control over the litigation rested with the government, under its professional service contract between environmental special counsel and the county.³⁴ The court reasoned that environmental special counselors are retained “only to assist” the litigation.³⁵ Finding no violation of the standard of neutrality, the appellate court permitted the agreement.³⁶

The California Supreme Court³⁷ agreed with the appellate court.³⁸ The court held that the government can retain environmental special counsel on a contingent fee basis if a “neutral, conflict-free government attorney[] retain[s] the power to control and supervise the litigation.”³⁹

The California lead paint decision adopted and expanded upon the rationale of the Rhode Island Supreme Court, which recognized the legality of substitute, contingency fee enforcement in the context of the Rhode Island lead paint litigation.⁴⁰ The Rhode Island Supreme Court cautiously

31. *Cnty. of Santa Clara v. Atl. Richfield Co.*, No. 1-00-CV-788657, 2007 WL 1093706, at *1 (Cal. Super. Ct. Apr. 4, 2007) (Komar, J.). The “Clancy doctrine” is drawn from the California Supreme Court’s decision in *People ex rel. Clancy v. Superior Court*, 705 P.2d 347 (Cal. 1985), which held that a civil public nuisance action is among the “class of civil actions that demands the representative of the government to be absolutely neutral,” precluding “the use in such cases of a contingent fee arrangement.” *Id.* at 352.

32. *Atl. Richfield*, 2007 WL 1093706, at *1.

33. *Cnty. of Santa Clara v. Superior Court*, 74 Cal. Rptr. 3d 842 (Cal. Ct. App. 2008).

34. *Id.* at 861.

35. *Id.* at 848.

36. *Id.* at 849.

37. At the supreme court level, the legality of the fee was the subject of significant commentator and *amici* attention. See, e.g., Law Professors Amici Brief, *supra* note 3 (arguing against a blanket prohibition on local government entities’ ability to retain private counsel on a contingency fee basis to assist in the pursuit of a lead paint abatement public nuisance action).

38. See *Cnty. of Santa Clara v. Superior Court*, 235 P.3d 21 (Cal. 2010).

39. *Id.* at 36.

40. *State v. Lead Indus. Ass’n*, 951 A.2d 428, 476 (R.I. 2008).

acknowledged the legality of the contingency fee agreement between the Attorney General's office and its environmental special counsel if the Attorney General maintains "absolute control" over the litigation, and emphasized that the Attorney General cannot delegate matters of discretionary decision-making to outside counsel.⁴¹

The California Supreme Court recognized that the distinction between the substitute contingency fee paid enforcer and a purely public attorney has greater or lesser impact on the legality depending upon the nature of the case and the type of remedy sought.⁴² The court's opinion, however, lacked any developed analysis in this regard. Rather, the court recognized the issue, and then assumed that monitoring would cure the problem.

II. ILLUMINATING THE SOCIAL UTILITY OF THE ENVIRONMENTAL SPECIAL COUNSEL ARRANGEMENT

The relatively sparse vetting of the environmental special counsel arrangement's propriety has thus far occurred primarily in the context of judicial opinions.⁴³ This framework is limited to addressing whether in the context of a particular case—such as a lead paint public nuisance action—absolute neutrality is required by the enforcing agents and whether monitoring and supervision adequately cure any actual or perceived self-interested behavior by the substitute enforcer.⁴⁴ This question of legality leaves entirely unexplored the greater policy issue of whether these arrangements are socially desirable.

The goal of this Part is to explore these policy issues in greater detail through the lens of whether substitute private augmentation accomplishes public enforcement goals in a manner that optimizes social utility. Viewing the arrangement through this lens can (1) provide greater illumination about whether environmental special counsel arrangements can achieve certain kinds of remedies as effectively as public enforcers, (2) better articulate the nuances of the costs and benefits when enforcement shifts

41. *Id.*

42. *Cnty. of Santa Clara*, 235 P.3d at 32–33.

43. *See, e.g.*, cases cited *supra* notes 28, 31, 33; cases cited *infra* notes 66, 68; *see also* Steiner, *supra* note 18.

44. *See* cases cited *supra* notes 28, 31, 33; cases cited *infra* notes 66, 68

from a salaried public attorney to a contingency fee paid, quasi-public enforcer, and (3) further address the cost mitigation potential of monitoring. Part A addresses the benefits of the arrangement and Part B addresses the costs of the arrangement. Part III balances these factors.

A. Benefits of the Environmental Special Counsel Arrangement

There is significant social utility to the environmental special counsel arrangement. First, the arrangement can promote social *efficiency* by achieving greater deterrence than a purely public enforcement system. Deterrence is optimized through heightened detection and/or through enhanced penalty recovery because it forces violators to more fully internalize the social costs of their aberrant behavior.⁴⁵ Commentators credit private enforcement as an important mechanism that uncovers and pursues tort liability, thus optimizing deterrence.⁴⁶ Such supplementation is desirable

45. See STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION 232 (1987). Other commentators, however, argue that entrepreneurs in fact provide little to no practical detection function. They argue that such agents "piggyback" off the government enforcement action wherever possible and do little independent investigation. See, e.g., Michael S. Greve, *The Private Enforcement of Environmental Law*, 65 TUL. L. REV. 339, 375 (1990) (recognizing private citizen suit enforcers tend to piggyback off government's search and detection efforts); Bryant Garth et al., *The Institution of the Private Attorney General: Perspectives From an Empirical Study of Class Action Litigation*, 61 S. CAL. L. REV. 353, 374-78 (1988) (finding that attorneys who were dependent on fees tended to piggyback their filings of private antitrust and securities cases upon government-initiated investigations and litigation).

46. See, e.g., Greve, *supra* note 45, at 375. Interestingly, however, while private enforcers generally tend to piggyback on the government's detection efforts, Professor Coffee has noted that sometimes the converse situation arises:

[W]idespread price fixing in the gypsum wall board industry was first revealed in a private treble damage action; later, the government began its own investigations. See *United States v. U.S. Gypsum Co.*, 383 F. Supp. 462, 465 (1974). Another obvious example was the government's lengthy (and ultimately unsuccessful) prosecution of IBM. For years, the government's attorneys piggybacked on the work of the private plaintiffs (chiefly, Control Data) whose more experienced attorneys undertook the major discovery and document review work. Although the government lost, Control Data obtained a favorable settlement. See Brill, *What to Tell Your Friends About IBM*, AMERICAN LAWYER, April, 1982, at 12, col. 1.

John C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of Lawyer as Bounty Hunter is Not Working*, 42 MD. L. REV. 215, 227 n.27 (1983); see also, e.g., THOMAS H. KOENIG & MICHAEL L. RUSTAD, IN DEFENSE OF TORT

because it requires those who wrong society to disgorge their illicit profits, and it serves to detect violations that might evade regulatory capture.⁴⁷

To the extent that the arrangement accomplishes enforcement that in fact translates to restorative activity, then the arrangement also facilitates the goal of restorative compensation. This can take the form of money that is in fact applied toward restorative activity or equitable remedy. As discussed in more detail below, however, the environmental special counselor's incentive to monetize the damage award can potentially be more of a cost than a benefit where equitable damages are available because the equitable character of the damage award may best suit the public's environmental interest.⁴⁸

Private enforcement can lead to heightened deterrence by augmenting government enforcement resources. This augments the enforcement power of governments that lack the structural or fiscal enforcement resources to effectively enforce by privatizing enforcement resources.⁴⁹

Importantly, the environmental special counsel arrangement also can facilitate social utility by advancing social equity.⁵⁰ Environmental equity goals are advanced by

LAW 5 (2003) ("[P]rivate attorneys general, not government regulators, discovered that [Bridgestone]/Firestone tires mounted on Fort Explorers caused hundreds of rollover accidents due to tread separation.").

47. See, e.g., John S. Moot, *Compliance Programs, Penalty Mitigation and the FERC*, 29 ENERGY L. J. 547 (2008); Marleen O'Connor, *Toward a More Efficient Deterrence of Insider Trading: The Repeal of Section 16(B)*, 58 FORD. L. REV. 309 (1989) (discussing efficiency in context of insider trading enforcement); Clifford Rechtschaffen, *Deterrence versus Cooperation and the Evolving Theory of Environmental Enforcement*, 71 S. CAL. L. REV. 1181 (1998).

48. See *infra* Part II.B.1.

49. While professional service retainer agreements routinely recite the need for such resource augmentation, governments vary in the degree to which they can in fact provide such structural support and environmental expertise. See Steiner, *supra* note 18, at 209 n.177 ("[T]he underlying assumption that states, territories and tribes are unable to bring such action in the first instance is not always true. Most states have functional environmental enforcement programs staffed with trained, specialty attorneys." (citing U.S. Dep't. of Justice, U.S. Att'y Manual 5-12.523 (2005), available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title5/12menv.htm#5-12.523)).

50. See, e.g., Mark A. Drumbi, *Poverty, Wealth, and Obligation in International Environmental Law*, 76 TUL. L. REV. 843 (2002); G.F. Maggio, *Inter/Intra Generational Equity: Current Applications Under International Law For Promoting the Sustainable Development of Natural Resources*, 4 BUFF. ENVTL. L.J. 161 (1997).

mitigating inferior enforcement power that disproportionately impacts socio-economically disadvantaged groups.⁵¹ From an environmental justice perspective, environmental special counsel can provide a particular benefit for socio-economically disadvantaged groups who are disproportionately impacted by contamination.⁵² Additionally, the arrangement can equalize enforcement power for sovereigns—such as some Native American tribes—that suffer injury but lack the structural and fiscal capability to enforce. In this way, the arrangement facilitates environmental justice for poorer communities that have been affected by environmental contamination. Moreover, the arrangement advances intergenerational equity concerns by providing environmental recompense that will help ensure sustainability of the resource for future generations.⁵³

B. Costs of the Environmental Special Counsel Arrangement

The environmental special counsel arrangement, nevertheless, implicates numerous costs that to some degree offset the arrangement's positive social utility. These costs are best conceived as ones of agency⁵⁴ that result in a misalignment of interests between the government enforcer and its substitute environmental special counsel proxy enforcer.

Because the arrangement introduces self-interested entrepreneurial behavior into public enforcement,⁵⁵ it creates the potential for suboptimal deterrence and diminished public compensation. This potential results from a heightened misalignment between the government's interests and the

51. See, e.g., Drumbi *supra* note 50; Maggio *supra* note 50.

52. See, e.g., Drumbi *supra* note 50; Maggio *supra* note 50.

53. Professors Bach and Weston make a compelling argument that the present generation has significant legal obligations to safeguard resources for future generations. See Tracy Bach & Burns H. Weston, *Recalibrating the Law of Humans with the Laws of Nature: Climate Change, Human Rights, and Intergenerational Justice* (Vt. Law Sch. Legal Studies Research Paper Series, Research Paper No. 10-06, 2009).

54. See, e.g., D. RODERICK KIEWIET & MATHEW D. MCCUBBINS, THE LOGIC OF DELEGATION: CONGRESSIONAL PARTIES AND THE APPROPRIATIONS PROCESS 24 (1991); H. W. Perry, Jr., *United States Attorneys—Whom Shall They Serve?*, 61 LAW & CONTEMP. PROBS. 129, 135 (1998).

55. Of course, it is possible that even salaried public officials might act in self-interested ways to gain higher salaries, more prominent titles, or for a variety of other reasons.

interests of its environmental special counselor proxy. Intentionally or not, as a result of the fee structure incentives, entrepreneurial agents may pursue their own self-interest to the derogation of the public's environmental interest.⁵⁶ There are numerous ways in which that misalignment manifests.

1. *Fee Structure That Creates a Preference For Monetary Awards Over Equitable Relief*

One way in which the misalignment is particularly acute relates to the environmental special counselor's incentive to monetize environmental damage awards, even when money is not the preferred form of relief from the standpoint of the public's environmental interest. Environmental enforcement often provides for equitable relief as a potential damage remedy.⁵⁷ When environmental injury has occurred, the goal is not simply deterrence—in which case money can readily substitute for its equitable equivalent—but the optimal goal is instead to ensure that the character of the remedy achieves both deterrence and environmental recompense.⁵⁸ In the environmental context, where the relief is not solely limited to monetary civil penalty, equitable relief is often the

56. See, e.g., Kevin M. Clermont & John D. Currihan, *Improving on the Contingent Fee*, 63 CORNELL L. REV. 529, 531–33 (1978); Coffee, *supra* note 46; John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 726 (1986) [hereinafter Coffee, *Understanding the Plaintiff's Attorney*]; Kenneth W. Dam, *Class Actions: Efficiency, Compensation, Deterrence, and Conflict of Interest*, 4 J. LEGAL STUD. 47 (1975); Louis Kaplow, *Private versus Social Costs in Bringing Suit*, 15 J. LEGAL STUD. 371 (1986); John Leubsdorf, *The Contingency Factor in Attorney Fee Awards*, 90 YALE L.J. 473 (1981); Mitchell & Schwartz, *Theoretical Implications of Contingent Legal Fees*, 12 Q. REV. ECON. & BUS. 69 (1972); Steven Shavell, *The Social versus the Private Incentive to Bring Suit in a Costly Legal System*, 11 J. LEGAL STUD. 333 (1982).

57. See, e.g., Clean Water Act, 33 U.S.C. § 1319(b) (1988); Resource Conservation and Recovery Act, 42 U.S.C. § 6928 (1988); Clean Air Act, 42 U.S.C. § 7413(b) (1988). But see Alexandra B. Klass, *Modern Public Trust Principles: Recognizing Rights and Integrating Standards*, 82 NOTRE DAME L. REV. 699 (2006) (discussing relief limitations).

58. See Charlie Garlow, *Environmental Recompense*, 1 APP. L.J. 1 (2002). Professor David A. Dana has urged, "the public interest that the [Attorney Generals] purportedly seek to advance . . . will not always be best served by maximizing the states' monetary relief. Sometimes public interest considerations dictate . . . focusing on nonmonetary relief more than monetary relief." Dana, *supra* note 7, at 323.

preferred measure of damages.⁵⁹ It is the actual remediation of contamination and restoration of injured resources that fully compensates the public.⁶⁰

When the enforcer is a salaried public official, the restorative compensation goal can more readily be achieved than through substitute environmental special counselor enforcement. The reason is inextricably linked to the fee structure of the players involved and the consequent incentives that the structures create.⁶¹ The government attorney is a salaried official whose fee is not formally tied to the damage award. The environmental special counselor, on the other hand, derives a fee from the damage award and is thus interested in monetizing that award to maximize personal gain.⁶² Rather than planting trees or remediating a spill, the environmental special counselor is personally interested in the monetary value of that construct to draw a contingency fee. Once the damage award has been depleted to pay the contingency fee, it is possible the remainder of the recovery will not yield the same amount of restorative activity as would be the case if only a salaried enforcer were at the helm of the enforcement action.⁶³

Even though a purely public enforcer might act in self-interested ways, the salary structure for the public enforcer creates a superior alignment of interests with the public than with one who derives a contingency fee from the public's bounty.⁶⁴ When the public enforcer outsources its function to its environmental special counsel proxy, it shifts from a salaried enforcer whose personal incentives are better aligned with the public's interest in obtaining equitable relief, to an enforcer whose personal incentives are to monetize the damage award where the public's environmental interest might be better served by equitable remedy.

59. See, e.g., William Murray Tabb, *Reconsidering the Application of Laches in Environmental Litigation*, 14 HARV. ENVTL. L. REV. 377, 407-08 (1990). Courts have recognized the preference for equitable relief. See, e.g., *Magnolia Coal Terminal v. Phillips Oil Co.*, 576 So. 2d 475, 486 (La. 1991) (Lemmon, J., concurring).

60. See Garlow, *supra* note 58.

61. See, e.g., Leubsdorf, *supra* note 56; Richard W. Painter, *Litigating on a Contingency: A Monopoly of Champions or a Market for Champerty*, 71 CHI.-KENT L.R. 625 (1995).

62. See Steiner, *supra* note 18.

63. *Id.*

64. See Rubenstein, *supra* note 2.

2. *Costs and Difficulty of Effective Monitoring*

Under the environmental special counsel arrangement, the government, which would otherwise have funded the enforcement efforts through a budgeted, general treasury allocation, shifts most of these costs to environmental special counsel. The government continues to incur monitoring costs, however.⁶⁵ The public enforcer, at least theoretically, screens the foundation for filing the initial complaint, oversees the litigation, and reviews or co-signs most court filings.

Arguably, because the Attorney General remains involved in the action in an oversight capacity, she is able to effectively monitor her environmental special counsel to ensure the result comports with the public interest. Because the Attorney General can supervise the environmental special counsel and can veto actions by environmental special counsel, she can check against actions that are, or appear, opportunistic, or otherwise do not comport with the public interest.⁶⁶

Indeed, as discussed in Part I, this argument resonates with courts that have examined and upheld the legality of such contingency fee agreements.⁶⁷ The Rhode Island Supreme Court, for example, discussed its awareness and concern about the potential for self-interested behavior on the part of environmental special counsel, but ultimately upheld the legality of the agreements because the court stated that the public enforcer's oversight and monitoring of outside counsel provide an adequate safeguard.⁶⁸

65. See e.g., Mark A. Cohen & Paul H. Rubin, *Private Enforcement of Public Policy*, 3 YALE J. ON REG. 167, 176 n.43 (1985).

66. Indeed, the ability of the government attorney to remain involved in these actions in a supervisory oversight capacity has been the pivotal factor that courts have relied upon in upholding the legality of these arrangements. See *Cnty. of Santa Clara v. Superior Court*, 235 P.3d 21 (Cal. 2010); *Cnty. of Santa Clara v. Superior Court*, 74 Cal. Rptr. 3d 842 (Cal. Ct. App. 2008); *State v. Lead Indus. Ass'n*, 951 A.2d 428, 476 (R.I. 2008). But see *Cnty. of Santa Clara v. Atl. Richfield*, No. 1-00-CV-788657, 2007 WL 1093706, at *1 (Cal. Super. Ct. Apr. 4, 2007) (Komar, J.) (invalidating agreements partially on ground that they are difficult to effectively monitor).

67. *Id.*

68. *Lead Indus. Ass'n*, 951 A.2d at 480. The court stated:

Attorneys who choose to litigate under contingent fee agreements understandably often have motives that, in whole or in part, are monetary in nature. Such motivation is qualitatively different from the more pristine considerations that should guide the Attorney General's decision-making. While we do not look upon contingent fee agreements

The notion of effective monitoring, of course, assumes that the government is in fact maintaining some basic level of monitoring. One must question, however, how a government that justifies the agreement on the grounds that it lacks sufficient resources to provide enforcement as a basic matter can effectively monitor the special counsel agreement at a level sufficient to curb agent opportunism. Thus, it is possible that some of the governments that are most in financial need of this enforcement arrangement are those least capable of effectively monitoring the environmental special counselor.

Another way to conceive of the problem is that the outsourcing arrangement creates a moral hazard that can result in inadequate oversight by the government monitor. The term “moral hazard” originates in the insurance arena and references the idea that insurance causes the insured to alter her behavior.⁶⁹ As applied to the environmental special counselor arrangement, the moral hazard argument is that the contingency fee arrangement, because it shifts the costs and risks of the litigation from the government to a private entrepreneur, acts like insurance. This engenders a moral hazard problem because the government, which has now “insured” its litigation risk, might be more risk tolerant in terms of litigation strategy and more lax in its oversight of environmental special counsel.⁷⁰ Thought of in this way, the

with a jaundiced eye due to the fact that they inherently implicate personal profit-making as a motivation, it is precisely because of the possibility of that motivating factor having an influence on decisions made by contingent fee counsel that it is utterly imperative that absolute primacy be accorded at all times to the decision-making role of the Attorney General when he or she has entered into an agreement with contingent fee counsel. Such absolute primacy is necessary in order to ensure that the profit-making motivation is always subordinated to the Attorney General’s “common law duty to represent the public interest.”

Id. (internal citations omitted).

69. Lawrence Summers, *Beware the Moral Hazard Fundamentalists*, FIN. TIMES ECONOMISTS’ FORUM, (Sept. 24, 2007, 10:21 AM GMT) <http://blogs.ft.com/economistsforum/2007/09/beware-the-mora.html>.

70. In other contexts, commentators and litigants challenged the legality of contingency fee arrangements on behalf of the public on the grounds that such arrangements raise moral hazards. See Brief of the Nat’l Paint & Coatings Assoc., Inc. as Amicus Curiae in Support of Petitioner at 6, *Commonwealth v. Janssen Pharm., Inc.*, No. 24 EAP 2009 (Pa. Aug. 11, 2009), available at <http://druganddevicelaw.net/Janssen%20materials/Janssen%20Paint%20Amicus%20brief.pdf>; Dayna Bowen Matthew, *The Moral Hazard Problem With*

government might be willing to take greater litigation risks and provide fewer monitoring safeguards because it is not fronting the costs or human resources. Some of the “red flags” identified in other analogous contexts as potential signals of weak oversight and monitoring exist in the environmental special counsel enforcement context.⁷¹

There is a concern that, even though the government oversees the litigation, it might not be possible to adequately monitor and safeguard against attorney opportunism as a practical matter.⁷² Even where settlement offers are monitored, the environmental special counsel typically had dealings, and may have sent bargaining signals, that influence formal settlement offers.

Moreover, at some juncture, the monitoring level is so extreme, and its attendant public costs so high, that the

Privatization of Public Enforcement: The Case of Pharmaceutical Fraud, 40 U. MICH. J.L. REFORM 281 (2007) (applying moral hazard analogy to public-private prosecution of Qui Tam).

71. Professor Coffee suggests a pattern that reflects that the attorney entrepreneur marketed the case to the client, rather than a scenario in which the client identified an enforcement need and then sought out the attorney, serves as a “red flag” that there may be weak oversight by the principal of the agent. Coffee, *supra* note 46, at 220, 229.

72. The California Superior Court identified this as its central concern when it struck down the contingency fee arrangement agreed upon between environmental special counsel and the Attorney General in the California lead paint lawsuit:

[A]s a practical matter, it would be difficult to determine (a) how much control the government attorneys must exercise in order for the contingent fee arrangement with outside counsel [to] be permissible, (b) what types of decisions the government attorneys must retain control over, e.g., settlement or major strategy decisions, or also day-to-day decisions involving discovery and so forth, and (c) whether the government attorney have been exercising such control throughout the litigation or whether they have passively or blindly accepted recommendations, decisions, or actions by outside counsel. . . . Given the inherent difficulties of determining whether or to what extent the prosecution of this nuisance action might or will be influenced by the presence of outside counsel operating under a contingent fee arrangement, outside counsel must be precluded from operating under a contingent fee agreement, regardless of the government attorneys’ and outside attorneys’ well-meaning intentions to have all decisions in this litigation made by the government attorneys.

Cnty. of Santa Clara v. Atl. Richfield Co., No. 1-00-CV-788657, 2007 WL 1093706, at *1 (Cal. Super. Ct. Apr. 4, 2007) (internal citation omitted). This opinion was reversed by the appellate court, Cnty. of Santa Clara v. Superior Court, 74 Cal. Rptr. 3d 842 (Cal. Ct. App. 2008), and the appellate court was upheld by the state supreme court. Cnty. of Santa Clara v. Superior Court, 235 P.3d 21 (Cal. 2010).

outsourcing is no longer justifiable.⁷³ Striking an optimal monitoring balance is essential to ensure that the monitoring carries positive social utility.

3. *Unregulated and Opaque Contracting*

The environmental special counsel enforcement arrangement is vulnerable to unchecked “pay to play” cronyism. In its present unregulated form, the environmental special counsel contract can be awarded without any form of open or competitive process. Sources cite evidence that environment special counsel arrangements are in fact awarded to attorneys who have financial ties to certain Attorney General’s personal or political allies.⁷⁴

Transparency is critical to ensure the integrity of the arrangement. These actions are styled in the name of the government. Thus it is not apparent to the onlooker that there is substitute enforcement at the helm of the litigation. While certain entities have begun the important public watchdog function of tracking and publishing campaign contribution links between Attorney Generals and

73. See Stewart Jay, *The Dilemma of Attorney Contingent Fees*, 2 GEO. J. LEGAL ETHICS 813, 872 (1989).

74. For example, there is evidence that plaintiff’s law firm Motley Rice contributed to Attorney General Patrick Lynch’s campaign before he decided to re-file the Rhode Island lead paint nuisance abatement case. John O’Brien, *Public Nuisance Bringing AGs and Lawyers Together, Attorney Says*, LEGAL NEWSLINE, Oct. 3, 2008, <http://www.legalnewsline.com/news/216331-public-nuisance-bringing-ags-and-lawyers-together-attorney-says>; see also *Links to Okla. AG Land Lawyers Contingency Prize: Big Chicken*, LEGAL NEWSLINE, Feb. 12, 2008, <http://www.legalnewsline.com/news/207875-links-to-okla.-ag-land-lawyers-contingency-prize-big-chicken> (reporting links between Oklahoma Attorney General Drew Edmondson and Tulsa-based law firm Riggs, Abney, Neal, Turpen, Orginson & Lewis, who were awarded the environmental special counsel contract in the “Big Chicken” lawsuit: “In the years 2001–2004, one researcher discovered 15 attorneys at Riggs Abney donated almost \$50,000 to Edmondson’s re-election campaigns. Partners M. David Riggs and Mike Turpen were Edmondson’s largest individual donors within the firm, giving \$8,600 and \$8,100 respectively.”). This occurred just prior to receiving Riggs Abney’s receipt of the environmental special counsel arrangement in the “Big Chicken” lawsuit, which was filed in 2005. Such alliances and claims of no-competition cronyism have been raised in other private entrepreneurial special counsel contexts. See, e.g., Editorial, *The Pay-to-Sue Business: Write a Check, Get a No-Bid Contract To Litigate for the State*, WALL ST. J., Apr. 16, 2009, at A14 (reporting plaintiff’s lawyer F. Kenneth Bailey made repeated donations to Governor Ed Rendell’s 2006 re-election campaign in the months preceding the state’s provision of a lucrative no-bid contingency fee contract to sue Janssen Pharmaceuticals).

environmental special counsel on their websites, these efforts are neither uniform nor comprehensive.⁷⁵ Such entities, moreover, are typically representative of business-centric political action groups⁷⁶ and thus lack the neutrality element that will make public dissemination of such information a trusted resource or an appropriate political check on the system.

4. *Agent Vulnerability to Litigation Blackmail*

The threat of collusive settlements is amplified in the environmental special counsel context.⁷⁷ First, defendants can use the threat of restorative remedial settlement offers to their strategic advantage. Defendants that might otherwise have offered more costly equitable settlements might instead offer less costly monetary settlement offers to send a signal to environmental special counsel that if they do not accept the monetary offer, the defendants' next offer will be equitable.⁷⁸ Thus, the environmental enforcement entrepreneur might collusively settle "on the cheap" to avoid the future "threat" of equitable settlement.⁷⁹

75. See, e.g., INSTITUTE FOR LEGAL REFORM, <http://instituteforlegalreform.com> (last visited Jan. 24, 2011); LEGALNEWSLINE.COM, <http://legalnewsline.com> (last visited Jan. 24, 2011); POINTOFLAW.COM: INFORMATION AND OPINION ON THE U.S. LEGAL SYSTEM, <http://pointoflaw.com> (last visited Jan. 24, 2011).

76. For example, the American Tort Reform Association, the United States Chamber of Commerce and its legal policy arm, the Institute for Legal Reform, to some extent track and report on contributions made by outside counsel to state Attorney Generals. See, e.g., JOHN FUND, INST. FOR LEGAL REFORM, CASH IN, CONTRACTS OUT: THE RELATIONSHIP BETWEEN STATE ATTORNEYS GENERAL AND THE PLAINTIFFS' BAR (2004), available at http://www.instituteforlegalreform.com/get_ilr_doc.php?id=942. The American Tort Reform Association draws its membership from the petroleum, medical, insurance and manufacturing industry, among others, and is dedicated to tort and liability reform. AMERICAN TORT REFORM ASS'N, <http://www.atra.org/about> (last visited Jan. 24, 2011). The U.S. Chamber of Commerce represents primarily small businesses along with state and local chambers and industry association and asserts as its core mission the "free enterprise before Congress, the White House, regulatory agencies, the courts, the court of public opinion, and governments around the world." U.S. CHAMBER OF COMMERCE, <http://www.uschamber.com/about> (last visited Jan. 24, 2011). The Institute for Legal Reform is the policy arm of the Chamber of Commerce. *Id.*

77. See Coffee, *Understanding the Plaintiffs Attorney*, *supra* note 56, at 677 (noting class action vulnerable to "collusive settlements . . . benefit plaintiff's attorneys rather than their clients.").

78. *Id.*

79. Sophisticated defendants know they are dealing with an entrepreneur

Second, environmental special counselors are particularly vulnerable to a type of personalized, strategic litigation attack because they may be the targets of motions to disqualify or void the fee arrangement on a variety of grounds.⁸⁰ Defendants have pursued such avenues in a number of environmental special counsel actions, including motions to disqualify on grounds of a statutory conflict between CERCLA and the contingency fee arrangement, and challenges to the legality of the fee arrangement on due process and ethical grounds.⁸¹ The potential to use the threat of a disqualification or fee challenge motion to the defendant's strategic advantage may lead to the possibility of environmental special counselors settling a case to avoid the threat of an adverse outcome.

Third, litigation-savvy defendants can strategically wage an early and aggressive "pleadings and paper war" with the goal of exacting such an extreme cost on the environmental special counselor that the entrepreneur decides that her personal profit is not worth the investment of future enforcement costs.⁸² While settling at an early juncture might make sense from the entrepreneur's litigation cost-

whose incentive is to invest as little as possible in litigation costs and maximize recovery. *Id.* at 690.

80. See, e.g., Defendant U.S.' Memorandum in Support of Motion to Strike Demand for Attorneys' Fees, *New Mexico v. Gen. Elec. Co.*, 322 F. Supp. 2d. 1237 (D.N.M. 2004) (No. 99-1118-LFG), 2000 WL 35574675; Transcript of Hearing, N.J. Soc'y for Envtl. & Econ. Dev. v. Campbell, No. MER-L-343-04 (N.J. Super. Ct. June 18, 2004), reprinted in William H. Hyatt, Jr. et al., *Natural Resource Damages: New Developments at the State Level*, in HAZARDOUS SUBSTANCES, SITE REMEDIATION, AND ENFORCEMENT 281, 365 ex.E (ALI-ABA, 2005).

81. See, e.g., Defendant U.S.' Memorandum in Support of Motion to Strike Demand for Attorneys' Fees at 11, *New Mexico*, 322 F. Supp. 2d. 1237 (No. 99-1118-LFG) (arguing that contingency fee representation is impermissible for natural resource damage actions under the plain language of CERCLA's use restriction and the "American Rule" prohibiting recovery of attorney's fees absent an express legislative provision permitting recovery of such fees); Order, *Commonwealth v. Janssen Pharm., Inc.*, No. 24 EAP 2009 (E.D. Pa. Aug. 17, 2010) (denying Motion to Disqualify outside counsel); Brief of the United States as Amicus Curiae Regarding Federal Preemption of Territorial Law Regarding Use of Natural Resource Damage Recovery, Comm'r of the Dep't of Planning & Natural Res., *Dean C. Plaskett v. Esso Standard Oil, S.A.*, No. 1:98-cv-00206-RLF (D.V.I. Feb. 14, 2005) (arguing that CERCLA's use restriction constitutes the only permissible uses of natural resource damage recoveries by a trustee and the use restriction preempts conflicting state, territorial or common laws).

82. See Coffee, *Understanding the Plaintiff's Attorney*, *supra* note 56, at 718-20.

benefit standpoint, it might not further enforcement policy goals.

5. *Over-Deterrence of "Deep Pocket" Defendants and Under-Deterrence of Lesser Capitalized Defendants*

Another troubling cost relates to particularized enforcement by substitute private enforcers who may over-enforce against deep pocket defendants and under-enforce against those with limited capital.⁸³ This can frustrate sound environmental enforcement because the least capitalized entities can cause substantial environmental harm by virtue of their operations.

Public enforcers are better suited to pursue enforcement against lesser-capitalized environmental violators than substitute environmental special counselors. Salaried public enforcers are better able to justify using treasury-allocated litigation funds to pursue less capitalized environmental violators because, even if those entities cannot fully compensate for injury, the enforcement efforts can achieve deterrence. Because environmental special counselors personally fund litigation, however, they are motivated to only pursue sufficiently capitalized violators who present a potential payoff that justifies the enforcement costs.

6. *Conflicts of Interest*

Another significant problem with the retention of substitute environmental special counselors on behalf of public enforcers is that many lawyers who seek to fill this quasi-public role are simultaneously members of the private plaintiffs' tort bar.⁸⁴ As such, they have divided loyalties between their private tort clients and their public tort clients. Recognizing the public/private client conflict of interest inherent in the State's retention of private attorneys, has led Professor David Dana to question whether there should be a blanket prohibition on outside counsel concurrently representing private tort plaintiffs.⁸⁵ Professor Dana

83. See Amanda M. Rose, *The Multiplier Approach to Securities Fraud Deterrence: A Critical Analysis*, 158 U. PA. L. REV. 2173 (2010) (private enforcement in context of securities fraud); see also Richard A. Bierschbach & Alex Stein, *Overenforcement*, 93 GEO. L.J. 1743, 1743 (2005).

84. Dana, *supra* note 7, at 323.

85. *Id.*

recognizes, however, that such a requirement would be difficult to meaningfully enforce and can have the undesirable result of eliminating qualified entrepreneurs from the pool of potential outside lawyers available to handle the action.⁸⁶ A transparent and competitive bidding structure for the professional service contract will ensure that there is a pool of entrepreneurs involved in the selection and will subject the resulting contract to political check.

7. *Perception Costs*

Lastly, there are perception costs associated with the environmental special counsel arrangement. The public perception of government and of the legal profession may deteriorate as a result of the appearance of opportunistic behavior by the guardians of the public's environmental trust.⁸⁷ The public may view the arrangement as reflecting entrepreneurial greed by those tasked with safeguarding the public fisc.⁸⁸ The public may further question the integrity of the legal profession's ability to adequately self-regulate the ethical conduct of its members.

On the other hand, the perception might be that it is beneficial to the public's interest.⁸⁹ The public might be inclined to favor any enforcement over low or no enforcement thus perceiving the arrangement in a positive light.

III. BALANCING THE COSTS AND BENEFITS OF SUBSTITUTE ENVIRONMENTAL ENFORCEMENT

While less numerous than the costs, this Article posits that the arrangement's benefits deserve more weight and are more significant than the costs. This is because the arrangement helps to fill a gap in enforcement coverage.

In environmental law, the government holds ecological resources in trust for the benefit of the public.⁹⁰ Significantly,

86. *Id.*

87. See Lester Brickman, *The Continuing Assault on the Citadel of Fiduciary Protection: Ethics 2000's Revision of Model Rule 1.5*, 2003 U. ILL. L. REV. 1181 (2003).

88. *Id.*

89. See Marc Galanter, *Symposium, Anyone Can Fall Down a Manhold: The Contingency Fee and its Discontents*, 47 DEPAUL L. REV. 457, 458-59 (1998).

90. Mary C. Wood, *Advancing the Sovereign Trust of Government to Safeguard the Environment For Present and Future Generations (Part I): Ecological Realism and the Need for a Paradigm Shift*, 39 ENVTL. L. 43 (2009);

governments are often the only viable entities with standing to sue for environmental redress.⁹¹ Yet, governments may not detect violations.⁹² Moreover, where detected, governments may lack the resources⁹³ or for other reasons choose not to enforce.⁹⁴ What then happens when the public has suffered an environmental injury, but the government for whatever reason does not detect or enforce on behalf of the public?

If there is a violation, and governments for whatever reason do not enforce, citizen suits provide a certain degree of enforcement augmentation,⁹⁵ but are, unfortunately, an incomplete gap filler. The Article III standing requirement and up front funding involved in prosecuting such suits are significant hurdles to citizen suit plaintiffs.⁹⁶ These tend to be costly, complex actions. As a result, citizen suits are often brought by public interest groups that have curried a substantial membership base from which to draw for purposes of institutional standing.⁹⁷ These organizations also have the civic motivation and limited revenue to selectively prosecute such actions. But organizational citizen suit plaintiffs “cherry pick” which cases to bring, and face difficult

Mary C. Wood, *Advancing the Sovereign Trust of Government to Safeguard the Environment for the Present and Future Generations (Part II): Instilling a Fiduciary Obligation in Governance*, 39 ENVTL L. 91 (2009).

91. See Allan Kanner, *The Public Trust Doctrine, Parens Patriae, and the Attorney General*, 16 DUKE ENVTL. L. & POL'Y F. 57, 112 (2005); Deborah G. Musiker, *The Public Trust and Parens Patriae Doctrines: Protecting Wildlife in Uncertain Political Times*, 16 PUB. LAND L. REV. 87 (1995).

92. Thompson, *supra* note 11, at 190 (“[M]any environmental violations are difficult or prohibitively expensive for the government to detect.”).

93. *Id.* at 191 (“[T]he enforcement wings of both federal and state environmental agencies are often woefully understaffed and underfunded.”).

94. *Id.* (“[P]olitical considerations and institutional structure may often lead agencies to ignore violations that are known and appropriate to prosecute.”). Monopolistic public enforcement, however, might not yield more optimal deterrence than a scheme augmented by private lawyers. Agency interests, and inefficiencies like regulatory capture and bureaucracy might misalign the private and public interest to a greater extent than under a regime of private enforcement. Amanda M. Rose, *Reforming Securities Litigation Reform: Restructuring the Relationship Between Public and Private Enforcement of Rule 10B-5*, 108 COLUM. L. REV. 1301, 1304 nn.9–10 (2008).

95. Thompson, *supra* note 11, at 191.

96. See Jeffrey Miller, *Private Enforcement of Federal Pollution Control Laws: The Citizen Suit Provisions*, SD88 ALI-ABA 819 (1999); Lynn Wright and Steven D. Schell, *Clean Water Act Citizen Suits: Litigation Strategies and Defenses*, SE98 ALI-ABA 1087 (2000).

97. See, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

hurdles to surmount with regard to Article III standing. Individual members of the public who might also bring citizen suits tend to lack the funding or motivation to prosecute such actions, and also face standing hurdles. Finally, while most major environmental statutes contain citizen suit provisions,⁹⁸ citizen suit provisions do not exist for all types of claims.

When violations occur, and neither the government nor a citizen brings an enforcement action, then there is an undesirable gap in enforcement coverage.⁹⁹ Yet, an effective environmental legal regime should, to the maximal extent possible, catch and enforce legal violations.¹⁰⁰ To the extent governments cannot enforce and citizen suits are neither available nor brought, the legal regime should provide meaningful enforcement augmentation mechanisms.¹⁰¹

98. See ENVTL. LAW INST., A CITIZEN'S GUIDE TO USING FEDERAL ENVIRONMENTAL LAWS TO SECURE ENVIRONMENTAL JUSTICE (2002), *available at* http://www.epa.gov/environmentaljustice/resources/reports/annual-project-reports/citizen_guide_ej.pdf.

99. Take the example of a contaminated groundwater aquifer that serves as a public potable water supply. If the government does not enforce against those who contributed to the contamination, and ensure that the damage award accomplishes resource restoration, those residents who rely upon the resource will have no ability to obtain redress but for citizen suits. If they cannot afford to front the costs of the citizen suit—and these are expert driven, costly claims—and if no institutional plaintiff with organizational standing steps in to take up their cause, these residents will continue to suffer ecological harm. Public health is jeopardized, and, significantly, future generations who will be affected by this contamination have no ability to seek redress. Such redress is about actual restoration of the aquifer, not about generating money for some alternative government expenditure.

100. Thompson, *supra* note 11, at 189 ("Trustworthy compliance statistics are difficult to obtain. Because regulatees that violate environmental laws have an obvious incentive to disguise violations, reported compliance rates can grossly overestimate actual compliance. State governments also sometimes massage compliance data to make their environmental programs look more successful than they actually are. Yet even reported rates reveal a significant level of noncompliance. EPA data for various periods in the 1990s, for example, showed that nearly twenty percent of major industrial, municipal, and federal permit holders under the Clean Water Act were in 'significant noncompliance' with their permit requirements for at least one calendar quarter. Studies by the General Accounting Office and various independent researchers have reported ever lower rates of compliance with many environmental laws, including the Clean Air Act, hazardous waste disposal laws, and safe drinking water standards.").

101. See generally Daniel C. Esty, *Toward Optimal Environmental Governance*, 74 N.Y.U. L. REV. 1495 (1999) (arguing for theory of optimal environmental governance that maximizes the social welfare delivered by regulatory structures by minimizing market failure harm and loss, constrained

Substitute environmental special counsel enforcement provides a useful gap filling augmentation because it provides standing derivative of the government's *parens patriae* or public trust standing, thus avoiding the Article III standing hurdle that hampers citizen suit enforcement. While, as presently structured, environmental special counsel arrangements require up front funding and thus, too, will lead to "cherry picking," certain structural reforms that better facilitate fee awards can make it a more palatable arrangement to the private enforcer. Finally, the arrangement permits a greater array of claims to be brought than citizen suits, which do not exist for all enforcement claims.

There should be a preference for government-led enforcement where feasible. Governments are best positioned to control uniform environmental policy, and environmental enforcement often involves complicated overlapping trusteeship issues that require government coordination. Such a government-led enforcement preference is built into environmental law and incorporated in citizen suit provisions.¹⁰² But, as a gap-filler, there should be privatized enforcement to ensure maximal redress of violations. Citizen suit enforcement is a useful, but incomplete, augmentation scheme.

IV. PROPOSAL FOR REFORMATIVE APPROACH

This Part determines that there are structural reforms that would still accomplish substitute enforcement augmentation while mitigating some of the more substantial costs involved with the contingency fee arrangement. While this Article does not attempt to frame the precise parameters

by such values as justice, liberty and equity).

102. Thompson, *supra* note 11, at 193 ("When Congress first authorized citizen suits, supporters and opponents alike worried about the potential for overlapping actions by private and public prosecutors—a problem that had plagued both the antitrust and securities fields where coextensive public prosecutions and private compensation actions were permissible. Congress agreed that exclusive public prosecution was to be preferred over dual prosecution. As a result, citizen suit provisions require plaintiffs to provide the federal government, the relevant state, and the alleged violator with sixty-days notice [sic] of the asserted violation. If the government commences a civil or criminal action or, under some statutes, an administrative enforcement proceeding, a citizen suit cannot be filed.").

of an appropriate structure—a highly complex undertaking worthy of its own article—three potential reforms are worth consideration: (1) an open and competitive bidding process; (2) a fee-shifting mechanism to provide for attorneys' fees on top of, not drawn from, the damage award; and (3) better controls on the monitoring process.

First, an open and competitive bidding process provides transparency and thus subjects the arrangement and its actors to a political check on the process.¹⁰³ The public service procurement literature reflects that competitive bidding facilitates prudent and economical use of public money.¹⁰⁴ Competition can facilitate the acquisition of legal services at the lowest cost and highest quality.¹⁰⁵ An open process, moreover, guards against corruption and favoritism.¹⁰⁶

Arguments against including legal services within the competitive process primarily focus on the fact that professional service contracts call for the services of highly specialized and skilled individuals.¹⁰⁷ The concern is that forced competition may lead to the undesirable result that the so-called "least competent contractor" may be awarded the contract simply because she bids the lowest.

Thus, while there should be an open and competitive process, there should not be a *requirement* that governments accept the lowest bid. Rather, the amount of the bid is but one factor that governments can rely upon in selecting a desired outside counsel arrangement. The transparency in this open procurement process to some degree tempers the concern that this type of arrangement circumvents democratic checks. This system is in keeping with the so-

103. Leah Godesky, Note, *State Attorneys General and Contingency Fee Arrangements: An Affront to the Neutrality Doctrine?*, 42 COL. J. LAW & SOC. POL'Y 587 (2002).

104. *Id.*

105. *Id.*

106. *Id.*

107. While governments have overwhelmingly enacted some type of legislative preference for government procurement contracts by competitive bidding process, the federal government and many state jurisdictions exclude professional legal service contracts from legislative procurement mandates. See e.g., 41 U.S.C. § 5 (2006) (excluding professional contracts). Although the federal government does not include it within the procurement provisions, as discussed earlier, it currently bans such contracts by Executive Order. See Exec. Order No. 13,433, *supra* note 1 and accompanying text.

called “beauty pageant”¹⁰⁸ requests for professional services, which are increasingly popular with clients who solicit competitive service arrangements from law firms.¹⁰⁹

A second reform would structure the fee award as a fee shift that is on top of, not drawn from, the damage award.¹¹⁰ This fee shifting mechanism mitigates, but does not fully cure, the potential for self-interest driven enforcement. It does, however, temper the most significant type of cost involved with contingency fee prosecuted environmental action enforcement—the potential to favor monetary over restorative damage recovery.¹¹¹ The fee can be structured in many ways including one that is determined as a percentage of the value of the recovery (even if the recovery is equitable), so as to retain the character of the contingency arrangement.¹¹² By shifting the fee, the damage award more fully shifts the costs of pollution to the defendant.

Third, there should be adequate controls on the monitoring process. At the very least, these controls should include a public enforcement “point person” who remains consistently involved in the litigation, and retains complete control of decision-making and veto power over the substitute environmental counselor.¹¹³ Furthermore, any defendant

108. Kenneth D. Agran, *The Treacherous Path to the Diamond-Studded Tiara: Ethical Dilemmas in Legal Beauty Contests*, 9 GEO. J. LEGAL ETHICS 1307, 1308 (1996) (“A legal beauty contest is a competitive interviewing process in which a client seeking legal representation (often a major corporation looking for outside counsel) interviews several different law firms for the same job. Such contests have become more common in recent years due to rising legal costs and increasing specialization in the legal profession. Would-be clients use beauty contests to find the best firm to suit their needs, while at the same time reducing legal costs by encouraging law firms to compete for their business.”).

109. These processes have been alternatively referred to as “beauty contests” or, in their more neutral term, “Requests for Proposals (RFPs)” for legal services. Larry Smith, *Recent Flurry of Beauty Contests Show Increased Sophistication*, 11 NO. 16 OF COUNSEL 1 (Aug. 17, 1992).

110. See Steiner, *supra* note 18 (arguing for fee shift on top of damage award in context of natural resource damage actions).

111. *Id.*

112. Much scholarship has been devoted to critiquing or proposing various fee structures to encourage private enforcement. See, e.g., Lucia A. Silecchia, *The Catalyst Calamity: Post-Buckhannon Fee-Shifting in Environmental Litigation and a Proposal for Congressional Action*, 29 COLUM. J. ENVTL. L. 1 (2004); Catherine R. Albiston & Laura Beth Nielsen, *The Procedural Attack on Civil Rights: The Empirical Reality of Buckhannon for the Private Attorney General*, 4 U.C.L.A. L. REV. 1087 (2007).

113. The California Supreme Court addressed some of these controls in *Cnty. of Santa Clara v. Superior Court*, 235 P.3d 21 (Cal. 2010).

should be informed in writing that she may contact the lead public attorney directly and without contacting the substitute environmental special counselor.¹¹⁴ The Professional Service Contract must make specific provision for this hierarchy of decision-making and controls.¹¹⁵

CONCLUSION

The environmental special counsel arrangement has significant potential social utility because it can greatly enhance governments' abilities to detect and enforce environmental violations. The arrangement can facilitate social efficiency by augmenting government enforcement resources, providing heightened deterrence and enhancing civil penalties. Moreover, the arrangement advances social equity by mitigating inferior enforcement power that disproportionately impacts socio-economically disadvantaged groups. In this way, the arrangement facilitates environmental justice for poorer communities that have been affected by environmental contamination but whose government enforcement structures cannot provide redress. It not only provides restorative efforts that can assist those presently impacted by contamination, but it further promotes intergenerational equity by providing restorative activity and, thus, resource sustainability for future generations.

The arrangement, however, imposes societal costs. Because the environmental special counsel arrangement encourages entrepreneurial behavior in the context of public environmental enforcement actions, there exists the potential for suboptimal deterrence and public compensation because of a misalignment between the interests of the government and its environmental special counsel proxy. Of the many costs, the most significant, from the standpoint of suboptimal environmental enforcement, is the entrepreneur's motivation to seek monetized damages where the public's environmental injury is best redressed by equitable restorative relief.

There should be a preference for government-led enforcement where feasible to avoid the monitoring problems inherent with outside counsel arrangements of any sort. But, where governments lack the resources or choose not to

114. *Id.*

115. *Id.*

enforce, there should be privatized substitute enforcement, beyond what is now captured by citizen suit enforcement, to ensure maximal violations redress. This augmentation provides standing for private attorneys general who might not otherwise surmount the Article III standing hurdle of citizen suit provisions.

While enhanced privatized enforcement beyond that which is currently captured by citizen suit provisions is desirable, this Article proposes that a better resolution will be one that uses a reasonable fee-shifting mechanism on top of—rather than a contingency fee drawn from—the damage award as its compensatory structure. That adjustment will mitigate the problem caused by entrepreneurial agents' preference for monetary awards. Because restorative remedy is such an integral component of effective environmental enforcement, the reform is worthwhile. Finally, there should be adequate controls on the government monitoring process.
